Memorandum

To: File/Committee

From: Charles Campbell

Date: November 14, 1991

Subject: CCACC: Pending Court Case

We have established trial dates of March 18, 19 and 20, 1992 for our appeal from the decisions of Customs Officials.

As you are aware, there is a selection of material seized by Customs Officials over the past two or three years that has been appealed by the staff at Glad Day for the purpose of setting up this litigation. The material is "soft core" gay magazines, but also includes some novels and books of stories. The magazines are Mandate, Blueboy and Playguy. The magazines have been pre-censored by their American publishers before being shipped into Canada. This means that certain passages in the stories have been whited out. This is done based on the submission by the publishers to Customs Officials for an "advisory ruling" prior to printing the "Canadian edition". The magazines with full text, when imported into Canada, are seized as "obscene". It is full text magazines which have been imported by Glad Day directly (as opposed to the publisher), seized by Customs Officials, and appealed by Glad Day.

The substance of the materials blanked out is always any explicit reference to anal intercourse. Similarly, the novels and books of stories are censored because of reference to anal intercourse. The material in issue here has been generally selected for test case purposes to be consensual non-violent sex. Generally speaking, the Committee has taken my "conservative" advice that more "raunchy" text will have less chance of winning in court, and we have followed a strategy of attempting to win incremental tolerance of gay adult sexual entertainment. There are obvious and significant drawbacks to this strategy, but in balance, this has been the way we have been proceeding, notwithstanding the fact this is far behind where many of us feel personally we should be at. The underlying reason for the conservative strategy is that we would lose more radical cases.

Technically, the issue before the court is the interpretation of the Criminal Code provisions on obscenity. As you are aware, Customs censorship is based on the view of Customs Officials interpreting the Criminal Code. Customs Department issues guidelines for its junior officers, and those guidelines as currently issued, we find very conservative interpretations of the Criminal Code obscenity provisions which specifically prohibit any explicit reference to anal penetration. We won an earlier decision on the Joy of Gay Sex of which the Department insists on giving the most narrow interpretation.

The Criminal Code defines obscenity as that which offends the community standards of tolerance. The political debate with respect to this section is monumental. There are numerous issues that arise with respect to this section, and a constant stream of cases brought to court by censored writers, magazine distributors, video distributors, etc. attempting to challenge this anachronism. We have discussed on a number of occasions other obscenity cases and how we might relate to them. We have all expressed our concern that a "gay" point-of-view on obscenity issues has not been clearly articulated in this litigation, and our desire to be able to do this in appropriate circumstances is one important factor which informs our strategic discussions.

The cost of trials and appeals is extremely high, especially if we get into elaborate evidence from social scientists with respect to "community standards", and issues of violence, degradation, etc.. Thus we have been attempting to pick and choose our issues for maximum effectiveness on a relatively modest budget.

I propose to bring this case forward on the basis that the recent and more liberal standards of the Ontario Board of Censors with respect to explicit sexuality in videos could be used as evidence of community standards that are certainly more liberal than that admitted by the Customs Officials. This would provide a simple way of presenting evidence to the court and obtaining a ruling that would compel Customs to follow a more liberal test. In earlier cases, the Board of Censors was often taken as a good measure of community standards of tolerance. Now that it is in a more liberal phase, I see no reason why we should not use it in a positive sense even though we all agree that as an Institution and a legal mechanism of the regulation of speech and thought, is completely unjustifiable.

This is not a Charter argument attacking the fundamentals of Customs Censorship as a violation of the principles of free speech. There is a case which raises that issue rather directly before the Supreme Court of Canada at the moment. There are some gay videos amongst the large group of videos in issue in that case, although they are not the main focus of the action. Our perspective in this case was much "smaller" but potentially extremely important. By our strategies, we can take the legislation at its word and still win a more liberal standard.

I note that our material is textual. The magazines all have photographs of pretty young men, but none coupling. We will argue that text is less inflamatory than pictures and videos.

In our last meeting, I stressed that the litigation in these matters of free speech and obscenity raises numerous complex issues of interest to rich video distributors and small magazine consumers alike. I have recently discussed some of these matters with Clayton Ruby who is always informed on such topics, and I will shortly have some discussions with Alan Gold who was doing some current video obscenity cases on related issues following, I am told, similar arguments to those we propose.

If I look down the road a little, I would identify a number of other areas where a particularly gay perspective might be litigated depending on the available material in the courts or Customs network, and the available resources of the Committee:

(a) A right to equally explicit gay and straight "adult entertainment material" - but winning equality may be no significant blessing if the standard for straight material is conservative.

(b) A "different" standard - a more liberal standard - with respect to gay material than straight material, given the different attitudes toward "consent", "violence", etc. in the gay and straight communities.

(c) Similarly, a different perspective on the emerging issue of "degradation" as the test of community standards.

(d) S & M Fantasy Material: "Inequality" will be a major problem. Generally speaking, conservative feminists would fear that more liberal standards for gay material might mean that violent and degrading material with respect to heterosexual relations would also be permitted.

The Committee should be kept informed of ongoing cases and the shifting tactical considerations for the gay community.

CC/tmb

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